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Supreme Court, U.S.
FILED

MAY 21 1980

JOSEPH F. SPANIOL, JR.,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM _____

JOSEPH CAMAIONE, SR.,
Petitioner

vs.

BOROUGH OF LATROBE,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
PENNSYLVANIA

VINCENT J. QUATRINI, JR., ESQUIRE
UNDERWOOD CENTER
550 EAST PITTSBURGH STREET
GREENSBURG, PA 15601
(412) 837-0080
I.D. NO. 19908

QUESTION PRESENTED

WHERE A MUNICIPAL POLICE OFFICER IS INJURED IN THE LINE OF DUTY AND IS RECEIVING A SALARY SUPPLEMENT UNDER A PENNSYLVANIA STATUTE (KNOWN AS THE PENNSYLVANIA HEART & LUNG ACT) DESIGNED TO PROVIDE FULL SALARY TO MUNICIPAL POLICE OFFICERS (STATE POLICEMAN, FIREMEN, AND OTHER INDIVIDUALS WHO ENGAGE IN HIGH RISK OCCUPATIONS FOR THE PUBLIC GOOD) DURING THEIR TEMPORARY INCAPACITY, DOES THE MUNICIPALITY VIOLATE DUE PROCESS WHEN IT TERMINATES THE OFFICER'S RECOGNIZED PROPERTY INTEREST IN THE HEART & LUNG ACT BENEFIT WITHOUT ANY NOTICE OR HEARING, BY INVOLUNTARILY TERMINATING THE OFFICER'S EMPLOYMENT -- ALSO WITHOUT NOTICE OR HEARING -- AS A CLAIMED ECONOMIC MEASURE?

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PETITION FOR WRIT OF CERTIORARI
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PENNSYLVANIA

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

JOSEPH CAMAIONE, SR., the
Petitioner herein, prays that a Writ of
Certiorari issue to review the judgment of
the Supreme Court of Pennsylvania entered in
the above-captioned case on February 20,
1990.

OPINIONS BELOW

The Opinion and Order of the Court of Common Pleas of Westmoreland County, Pennsylvania, is unreported, and is printed in Appendix A hereto, *infra*, page 2A.

The Opinion and Order of the Commonwealth Court of Pennsylvania is reported at 113 Pa. Comwlth. 113, 536 A.2d 500, and is printed in Appendix A hereto, *infra*, page 17A.

Permission to appeal to the Supreme Court was granted at 520 Pa. 608, 553 A.2d 970.

The Opinion of the Court and Judgment of the Supreme Court of Pennsylvania is reported at 567 A.2d 638 (it is not yet printed in the Pennsylvania reporting system), and is printed in Appendix "A" hereto, *infra*, page 28A.

The Order of the Supreme Court of Pennsylvania on Application for Reargument is unreported, and is printed in Appendix A hereto, *infra*, page 44A.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on December 21, 1989. (Appendix A, *infra*, page 28A) A timely petition for rehearing was denied on February 20, 1990. (Appendix A, *infra*, page 44A) The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 257.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

1. Constitution of the United States of America, Amendment 14, Section 1
(See Appendix B (1)).
2. Constitution of the Commonwealth of Pennsylvania, Article I, Section 1
(See Appendix B (2)).
3. Pennsylvania Heart and Lung Act,
53 P.S. Section 637 (See Appendix B (3)).
4. Pennsylvania Borough Code, 53 P.S.
Section 46190 (See Appendix B (4)).
5. Pennsylvania Administrative Agency Law,
2 Pa. C.S.A. Section 504
(See Appendix B (5)).

STATEMENT OF THE CASE

On February 5, 1975, Joseph Camaione, Sr. was injured during the course of his employment as a policeman for the Borough of Latrobe. He was placed on workers' compensation. In addition, he began to receive from the Borough of Latrobe the difference between his workers' compensation benefits and his salary. The Pennsylvania Heart and Lung Act of June 28, 1935, mandates the salary payment differential to a policeman injured during the course of his employment until the disability has ceased.

On July 27, 1981, the Borough passed a resolution retiring Mr. Camaione from the police force pursuant to Section 46190 of the Borough Code. Mr. Camaione was notified orally of his involuntary retirement after the date the resolution was passed.

On July 31, 1981 Mr. Camaione received written notice of the resolution.

The retirement resolution became effective on September 1, 1981.

Simultaneously with the retirement, the Borough terminated Mr. Camaione's Heart and Lung benefits. The Borough did not give Mr. Camaione any notice that they were going to terminate his Heart and Lung benefits.

Likewise, the Borough did not hold a hearing to determine if Mr. Camaione could or would return to work as a dispatcher (his preinjury job) nor did the Borough attempt to determine if Mr. Camaione was permanently disabled.

In his Memorandum submitted to the Court of Common Pleas of Westmoreland County, Pennsylvania, Mr. Camaione, through his counsel argued that such action deprived Mr. Camaione of rights to which he was entitled by law. (See Appendix C, page 41A).

On or about January 12, 1983, the Workers' Compensation referee found that Mr. Camaione's disability was no longer total, but partial, and his Worker's Compensation benefits were reduced. After numerous attempts to have the Borough reinstate his

Heart and Lung benefits, Mr. Camaione filed an action in Mandamus against the Borough of Latrobe on May 22, 1984 seeking reinstatement of the salary differential due him under the Heart and Lung Act.

The Court of Common Pleas of Westmoreland County denied Mr. Camaione's request and dismissed his Complaint in Mandamus. (The decision of the Court did not dispose of Mr. Camaione's deprivation of property rights without due process of law argument, since the decision was made on the basis of other issues in the case (see Appendix A, page 2A).

Mr. Camaione appealed the decision of the Court of Common Pleas to Commonwealth Court. The denial of Mr. Camaione's property right to Pennsylvania Heart and Lung Benefits without due process of law was argued in the Brief filed on Mr. Camaione's behalf. (See Appendix C, page 43A).

The Commonwealth Court reversed the trial court's Order, ruling specifically that

Mr. Camaione had been deprived of property rights without due process of law, and remanded the case to the Court of Common Pleas, directing reinstatement of Mr. Camaione's benefits until the Borough held an evidentiary hearing to determine whether or not Mr. Camaione's temporary disability had ended (See Appendix A, page 12A).

The Borough timely requested leave to appeal to the Supreme Court of Pennsylvania, and allowance was granted. Again, the issue of Mr. Camaione's deprivation of property rights without due process of law was argued in the Brief filed on behalf of Mr. Camaione. (See Appendix C, page 54A). However, the Pennsylvania Supreme Court reversed the judgment of the Commonwealth Court of Pennsylvania, and reinstated the Order of the Court of Common Pleas of Westmoreland County. The Pennsylvania Supreme Court ruled that Mr. Camaione was not entitled to a hearing before terminating his Pennsylvania Heart and Lung

Act benefits because he had no property right to those benefits.

Mr. Camaione timely filed an Application for Reargument, which was denied by the Supreme Court of Pennsylvania on February 20, 1990 (See Appendix A, page 30A).

REASONS FOR GRANTING WRIT

In 1935, Pennsylvania enacted a statute which provides supplemental income to local policemen, state policemen, firemen, corrections officers and other public servants who are injured in the line of duty and become temporarily incapacitated.¹

The statute has become known as the Heart and Lung Act because police and firefighters who are employed for a number of years and who suffer heart attacks or contract lung diseases receive favorable presumptions that their disability arose out of their work.

The rationale behind the Heart and Lung Act is simple. Police officers,

¹ See Heart & Lung Act, Appendix B (3), page 34A.

firefighters, corrections officers and similarly situated individuals are engaged in high risk employment, being paid modest wages, for the public good. One way to attract individuals to take such jobs is to assure them that if they become injured in the line of duty and temporarily cannot work, that the government agency they work for will continue to pay them their full salary until they are able to get back on the job. Kurtz v. Erie, 389 Pa. 557, 133 A.2d 172 (1957).

And so it has been, in Pennsylvania, since 1935. Over the years, one or another government agency has tried to cut off the salary supplement without giving the officer a chance to be heard on the decision to terminate benefits.

Eventually, the Supreme Court of Pennsylvania addressed this issue of involuntary unilateral termination of benefits and held, in the case of Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981), that a policeman who is

injured in the course of his employment and is receiving Heart and Lung benefits has a separate property right in said benefits.

Therefore, the Pennsylvania Supreme Court stated, this property right could not be extinguished without due process consisting of a hearing² and a finding that the police officer had recovered from his work-related injury or had become permanently disabled from the work injury.³ Cunningham v. Pennsylvania State Police, 510 Pa. 74, 507 A.2d 40 (1986) and Callahan, supra.

And so it was when the Borough of Latrobe petitioned the Pennsylvania Supreme

² The Supreme Court of Pennsylvania referred to Section 504 of the Administrative Agency Law as the standard for an adjudication by any tribunal, whether judicial or administrative: See Appendix B (5), page 39A.

³ Case law developed which held that if a police officer's disability is determined to be permanent, benefits may be terminated. Kurtz, supra.; Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957).

Court in 1988 to hear its prayer that it be permitted to terminate Mr. Camaione's Heart and Lung benefits, without a hearing and without notice, because the Borough was in an economic pinch. The Borough told the Court that its economic plight was paramount to Mr. Camaione's right to a hearing on his Heart and Lung Act benefits.

Therefore, the Borough argued, when it involuntarily furloughed Mr. Camaione under another Pennsylvania statute⁴, it had the right to simultaneously stop paying supplemental income benefits to Mr. Camaione. Under these circumstances, the Borough argued, Mr. Camaione was not entitled to a due process hearing. It was irrelevant, the Borough contended, whether Mr. Camaione had recovered or became permanently disabled from his work injury. In other words, the Borough charged, Mr. Camaione's property right was supplanted by the Borough's need to manage

⁴ See Pennsylvania Borough Code, Appendix B (4), page 37A.

its finances.

Essentially, the Supreme Court of Pennsylvania adopted the rationale of the Borough of Latrobe, and it reversed the holding of the lower appellate court which had decided the case in favor of Mr. Camaione based on the rationale of Callahan, supra and Cunningham, supra.

Judge Papadakos, writing for the Court, stated that the holding in Callahan would not be extended to protect officers who are involuntarily retired under the Borough Code because of economic reasons. The right to a hearing, he noted, prior to termination of Heart and Lung benefits, only applies to members of the police force. And since the Borough had the right to retire Mr. Camaione under the Borough Code, he was no longer a member of the police force. And since he was no longer a member of the police force, he was not entitled to a hearing. And since he was not entitled to a hearing, the Borough had the right to unilaterally terminate his

Heart and Lung benefits.

What happened to Mr. Camaione's Callahan created property right in his Heart and Lung benefits?

Judge Papadakos announced that Mr. Camaione had no property right since he was no longer a member of the protected group, namely, the police force.

Your Petitioner humbly submits that the holding of the Pennsylvania Supreme Court puts at risk the property rights of all injured police officers, firefighters and corrections officers in the Commonwealth of Pennsylvania in their statutorily created Heart and Lung benefits.

The Pennsylvania Supreme Court has flatly stated that even though Pennsylvania has enacted specific legislation that requires payment to an injured public servant - until that public servant recovers or becomes permanently disabled - and even though the Supreme Court has recognized that the public servant has a separate property

right in those benefits, all the employing government agency has to do to extinguish that property right is to terminate the employment.

Your Petitioner humbly submits that the Supreme Court of Pennsylvania has deprived Joseph Camaione - and all other public servants in the Commonwealth of Pennsylvania similarly situated - of his property right in his Heart and Lung benefits without due process of law.

Your Honorable Court has heard the argument innumerable times before - an individual shall not be deprived of property without due process of law pursuant to the Fourteenth Amendment to the Constitution of the United States. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (wherein a public employee who had a property interest in continued employment was entitled by due process of law, to a pretermination hearing).

The Supreme Court of Pennsylvania

recognized Heart and Lung benefits as a separate property right when they decided the case of Callahan, supra. The Supreme Court stated that since it was a separate property right it could not be terminated without affording Mr. Callahan notice of the intended action and a right to be heard on the matter.

However, less than two years later, the Court has betrayed that position with its holding in Camaione.

It will be argued that Callahan is distinguishable because Callahan was still a member of the police force and Camaione was not.

And there is the rub. The crux of this case is the fact that the Borough involuntarily removed Camaione from the protected class and then said he was not entitled to due process because he was not a member of the protected group.

The essence of due process is the protection from arbitrary and unfair actions by injecting a mechanism or procedure -- in

this case a hearing -- that can be reviewed by a judicial forum.

If the Borough of Latrobe can short circuit the review process by involuntarily removing the individual from the group entitled to the review process, it would make a sham of the whole procedure.

The Pennsylvania Commonwealth Court -- the lower appellate court in this case-- pointed out the danger inherent in allowing the Borough to do what it did:

In the present case Appellant's (Camaione's) right to Heart and Lung benefits was lost through the Borough's act of involuntarily retiring him. Although Appellant was afforded his due process rights with respect to the involuntary retirement action, he was given no notice that the procedure would also dispose of his separate but dependent rights under the Heart and Lung Act. In cases such as that presented here, the potential for abuse by the Borough in involuntarily retiring employees in order to terminate their responsibility under the Heart and Lung Act appears

clear.

Accordingly, we hold that one's property rights under the Heart and Lung Act cannot be extinguished by an involuntary retirement unless that action also contains notice to the retiree of the effect involuntary retirement will have on the retiree's right to Heart and Lung benefits.

Since the notice provided Appellant in the present case with respect to his involuntary retirement did not also notify him of the effect involuntary retirement would have on his right to Heart and Lung benefits, those benefits cannot be terminated on the basis of his involuntary retirement.

The Commonwealth Court even anticipated that the Borough of Latrobe might try to use the involuntary termination to say that Camaione was no longer an employee and therefore not protected. Consequently, they added a footnote to their decision to warn the Borough not to try it!

We emphasize that Heart and Lung benefits also cannot be terminated later in a separate adjudication on the basis that the retiree is no longer an

employee where the initial involuntary retirement would provide a basis for the termination of Heart and Lung benefits. In situations such as that presented here, it appears that in order to terminate Heart and Lung benefits, the Borough must conduct a hearing and prove that Appellant's partial disability has ceased or become permanent.

It is ironic that the Commonwealth Court -- the appellate court created in Pennsylvania specifically for the purpose of handling government agency issues -- warned the Borough of Latrobe not to try to circumvent due process by a boot strap argument and its own Supreme Court did exactly what it was trying to prevent.

If the decision of the Pennsylvania Supreme Court is permitted to stand, the embryo for unfair and arbitrary termination of a recognized property interest in supplemental benefits under the Heart and Lung Act will be spawned.

It is clear that the Pennsylvania Supreme Court sought to protect the Borough

of Latrobe's financial well being at a time when it was having difficulty balancing its budget.

However, in accomplishing this laudable goal, the Court has permanently damaged the integrity of the Pennsylvania Heart & Lung Act. A single Borough's plight has been elevated over the due process rights of all state police, enforcement officers, investigators, parole agents, correction officers, psychiatric security aides, drug enforcement agents, policemen, firemen, and park guards in the Commonwealth of Pennsylvania.

Under the rationale of Judge Papadakos, non policemen, such as firemen and prison guards, will be subject to termination of their Heart and Lung benefits if they are "no longer a member of the active force."

As a result, a fire fighter who is injured in the course of his employment may be "laid off" and not recalled by the municipality three weeks after his/her

injury. Concurrently, the fire fighter's Heart and Lung benefits will be terminated.

Likewise, a park guard who is temporarily injured may be terminated, without cause, and simultaneously have his or her Heart and Lung benefits cut off.

The language of the Pennsylvania Supreme Court decision has created an escape valve for any government entity that wants to avoid the responsibility for paying benefits under the Heart & Lung Act without establishing that the injured individual has recovered or become permanently disabled.

If this decision stands, government agencies will have a mechanism to slowly devise new and creative ways to furlough their employees when they want to reduce their obligation under the Heart and Lung Act.

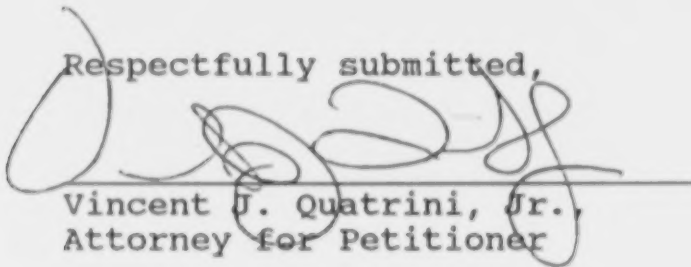
The instant case is important to thousands of public servants -- injured public servants -- throughout the Commonwealth of Pennsylvania.

Petitioner humbly requests this Honorable Court to issue a writ of certiorari to the Supreme Court of Pennsylvania.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme of Pennsylvania in Joseph Camaione, Sr. vs. Borough of Latrobe. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed.

Respectfully submitted,

A large, stylized handwritten signature in dark ink, appearing to read 'Vincent J. Quatrini, Jr.', is written over a horizontal line. The signature is fluid and cursive, with the first letter 'V' being particularly large and looping.

Vincent J. Quatrini, Jr.,
Attorney for Petitioner

APPENDIX A- OPINIONS BELOW

(1) Opinion and Order of the Court of Common Pleas of Westmoreland County, Pennsylvania dated May 22, 1986

(2) Opinion and Order of the Commonwealth Court of Pennsylvania dated January 27, 1988

(3) Judgment and Opinion of the Supreme Court of Pennsylvania dated December 21, 1989

(4) Per Curiam order of the Supreme Court of Pennsylvania dated February 20, 1990.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

JOSEPH CAMAIONE, SR.,)	No. 3473 of 1984
Plaintiff)	
)	
)	
Vs.)	
)	
BOROUGH OF LATROBE,)	
Defendant)	

OPINION AND ORDER

This proceeding is an action in mandamus filed by the plaintiff, Joseph Camaione, Sr., against the defendant, Borough of Latrobe. Plaintiff was a former Borough police officer and seeks to compel the defendant to pay plaintiff's full salary entitlement under the Heart and Lung Act. (Act of June 28, 1935 P.L. 477, Section 1, 53 P.S. Section 637, as amended May 31, 1974, P.L. 309 No. 99, Section 1, 53 P.S. Section 637).

The plaintiff had been employed as a police officer by the defendant Borough prior to suffering a work related injury on

February 5, 1975. Plaintiff received his full salary entitlement under the Heart and Lung Act for approximately six and one-half (6 1/2) years until his involuntary retirement at age fifty-five (55) from the defendant Borough police force effective September 1, 1981. Plaintiff's combined workmen's compensation benefits and retirement benefits exceeded his full salary entitlement under the Heart and Lung Act.

On January 12, 1983, workmen's compensation referee, Lloyd R. Warren, found that plaintiff's condition had changed from a total disability to a partial disability which would continue for a period of five hundred (500) weeks. Plaintiff's partial disability entitlement of \$63.00 per week was commuted to a lump sum settlement payment of twenty-five thousand dollars (\$25,000.00). The referee's determination reveals that plaintiff's disability would have continued beyond his normal retirement age of sixty-five (65) years.

Plaintiff's action in mandamus requests the defendant Borough's payment of Heart and Lung salary benefits for the period commencing on and after September 1, 1981, the effective date of his involuntary retirement. This Court denies plaintiff's request for Heart and Lung Salary benefits for the following reasons:

FINDINGS OF FACT

1. Plaintiff was employed by the defendant as a police officer from the 1st day of December, 1950, to September 1, 1981. (Stipulation of Fact No. 3).

2. On February 5, 1975, plaintiff suffered a work-related injury which resulted in plaintiff becoming temporarily totally disabled. (Stipulation of Fact No. 4).

3. By Order of Floyd R. Warren, Worker's Compensation Referee, dated January 12, 1983, the Referee found that on January 10, 1983, plaintiff's disability changed from total disability to partial disability which entitled plaintiff to Worker's Compensation

at the weekly rate of \$63.00. (Stipulation of Fact No. 6).

4. By the same Order, the Referee also found that plaintiff's disability would continue for a period of 500 weeks and commuted his entitlement to a lump sum amount of \$25,000.00, which amount was paid to plaintiff on or about February 22, 1983. (Stipulation of Fact No. 7).

5. For reasons of economy, and the necessity to reduce projected expenditures in order to balance the budget for the fiscal year ending December 31, 1981, the Borough of Latrobe found it necessary to reduce the number of paid employees of the Latrobe Borough Police Department by two members. (Stipulation of Fact No. 8).

6. In order to comply with Section 1190 of the Borough Code of the Commonwealth of Pennsylvania, subsection (i) providing for retirement of eligible employees beginning with the oldest employee and following in order of age respectively, the Borough of

Latrobe passed a Resolution on July 21, 1981, retiring from the police force plaintiff, Joseph Camaione, Sr., and one other police officer. (Stipulation of Fact No. 9).

7. The defendant, Borough of Latrobe, followed all proper statutory procedures in effectuating retirement of the plaintiff. (Stipulation of Fact No. 10).

8. At the time of the enactment of the Resolution for retirement, plaintiff, Joseph Camaione, Sr., was fifty-five (55) years old and was one of the two oldest employees on the Latrobe Borough police force eligible for retirement. (Stipulation of Fact No. 11).

9. Plaintiff did not, by formal action, contest or object to his retirement, nor the procedure by which he was retired by defendant, either at the time of his retirement or at any time subsequent thereto. However, plaintiff did object to the retirement by refusing to sign a retirement form and verbally conveying his protest to

the Borough Administrator and to the Insurance Carrier for the retirement fund. (Stipulation of Fact No. 12)

10. Plaintiff was notified orally of his retirement after the date of enactment of the retirement resolution and was personally served with a notice of his retirement describing the retirement resolution on July 31, 1981. (Stipulation of Fact No. 14)

11. Plaintiff's retirement became effective on September 1, 1981. (Stipulation of Fact No. 14)

12. Plaintiff was paid his full rate of salary under the Heart and Lung Act through September 1, 1981. (Stipulation of Fact No. 15)

13. Defendant Borough hired two police officers on June 11, 1984, without offering either position to the plaintiff. (Stipulations of Fact Nos. 22 and 23)

14. Plaintiff's net monthly income as a police officer for the years 1981

through 1985 would have been, as follows:

1981 - \$1,052.13 per month

1982 - \$1,197.23 per month

1983 - \$1,244.88 per month

1984 - \$1,282.86 per month

1985 - \$1,326.62 per month

(Stipulation of Fact No. 18)

15. Plaintiff's monthly retirement check, commencing September 1, 1981, is \$684.12. (Stipulation of Fact No. 19)

16. Plaintiff's monthly workmen's compensation benefit for the calendar year 1981 through 1985 is as follows:

September 1, 1981, to December

31, 1981 - \$590.67 per month

January 1, 1982, to December

31, 1982 - \$590.67 per month

January 1, 1983, to present -

\$273.00 per month

(Stipulation of Fact No. 20)

17. During the period January 1, 1981, to December 31, 1981, plaintiff realized an increase of \$222.62 "per month"

as a consequence of the defendant Borough's involuntary retirement action. [641.12 retirement income + 590.67 workmen's compensation = \$1,274.79 - \$1,053.13 Heart and Lung Act entitlement = \$222.62 gain in monthly income]

18. During the period January 1, 1982, to December 31, 1982, plaintiff realized an increase of \$77.56 "per month" as a consequence of the defendant Borough's involuntary retirement action. [\$684.12 retirement income + 590.67 workmen's compensation = \$1,274.79 - \$1,197.23 Heart and Lung Act entitlement = \$77.56 gain in monthly income]

19. Plaintiff established no economic loss during the period September 1, 1981 to December 31, 1982, by reason of involuntary retirement, and in fact, realized an economic gain of \$1,598.58 during said period.

$$\begin{aligned} 1981 - \$222.62 \text{ per month} \times 3 \text{ months} &= \\ \$ 667.86 \end{aligned}$$

1982 - \$77.56 per month x 12 months =

930.72

\$1,598.58

CONCLUSIONS OF LAW

1. Plaintiff's right to Heart and Lung Benefits commenced from the date he sustained a temporary disability during the performance of his duties as a police officer for the defendant Borough.

2. Plaintiff's right to Heart and Lung Benefits terminated during the period of his retirement from employment commencing September 1, 1981.

3. The Heart and Lung Act provides for full salary entitlement where a claimant suffers a "temporary" disability arising in the performance of his duties, and reflects a statutory expectation that the claimant shall return to his employment.

4. Plaintiff would have further lost any entitlement to Heart and Lung benefits on and after January 12, 1983, the date of the workmen's compensation referee's

determination that plaintiff's disability would continue for a period of 500 weeks (i.e. 9 years, 32 weeks through approximately September, 1992). Plaintiff would have attained his normal retirement age of sixty-five (65) in the year 1991.

5. Plaintiff failed to appeal the referee's determination, and in fact accepted on or about February 22, 1983, a \$25,000.00 lump sum commutation of workmen's compensation benefits due plaintiff through approximately September, 1992.

6. Plaintiff's acceptance of the \$25,000.00 commutation of benefits reflects that he would not return to his former employment as a full-time police officer of the Defendant Borough police department.

7. Plaintiff never appealed the Borough's involuntary retirement resolution enacted on July 27, 1981, and which became effective as to the plaintiff on September 1, 1981. ["Local Agency Law" (2 Pa. C.S.A. Section 101, et seq.)]

8. The defendant Borough followed all proper statutory procedures in effectuating retirement of plaintiff. (Stipulation of Fact No. 10)

9. A Local Agency Law appeal must be filed within thirty (30) days of the defendant Borough's decision (2 Pa. C.S.A. Section 752, 42 Pa. C.S.A. Section 5571).

10. Plaintiff failed to appeal the decision of the defendant Borough either with respect to his involuntary retirement, effective September 1, 1981, or the hiring of two police officers on June 11, 1984.

12. Plaintiff's mandamus action does not seek to reinstate his employment or to contest the hiring of the two other officers, but rather seeks a reinstatement of his Heart and Lung benefits.

DISCUSSION

The plaintiff claims a right to Heart and Lung benefits from and after September 1, 1981. Plaintiff believes that Heart and Lung benefits are not foreclosed by

a lawful involuntary retirement. The Court in not aware of any appellate court authority on such issue. Notwithstanding, the plaintiff accepted retirement benefits and failed to timely appeal either his involuntary retirement or the termination of Heart and Lung benefits. Further, plaintiff accepted both workmen's compensation benefits and retirement benefits during the period September 1, 1981, to December 31, 1982, and realized an economic gain in excess of his full salary entitlement under the Heart and Lung Act.

Plaintiff's claim for Heart and Lung benefits must further be denied by reason of the referee's decision finding plaintiff partially disabled, and that such disability would continue for a period of 500 weeks which extended beyond the date of the plaintiff's normal retirement age, sixty-five (65). Plaintiff failed to appeal the referee's decision, and accepted the sum of \$25,000.00 as a lump sum commutation of his

workmen's compensation entitlement.

The Heart and Lung Act requirement for a "temporary" incapacity reflects a statutory expectation that the claimant shall return to his employment. A "permanent" incapacity which would bar a claimant from returning to his employment does not confer any right to Heart and Lung benefits. Consequently, the referee's decision is of particular significance in that the plaintiff's incapacity would extend for 500 weeks to the year 1992. The plaintiff accepted the \$25,000.00 in commutation of benefits through 1992 pursuant to the referee's decision and is now barred from this retroactive claim for Heart and Lung benefits.

The defendant Borough acted lawfully in retiring plaintiff - effective September 1, 1981. Plaintiff's request in 1984 to resurrect Heart and Lung benefits is foreclosed by virtue of his inaction of failing to appeal the decision of the

defendant Borough and/or the workmen's compensation referee, and waiting approximately three years from the date of his retirement prior to commencing this action in mandamus. Plaintiff failed to appeal said decisions and accepted his retirement benefits, and the \$25,000.00 lump sum commutation of benefits.

This Court is cognizant of the policy considerations for the Heart and Lung Act, and makes its decision intending no precedent for an automatic termination of Heart and Lung Benefits by reason of either municipal reductions in staff for budgetary considerations or a workmen's compensation disability determination. This Court's decision is limited solely to the facts of the instant proceeding.

For the above mentioned reasons, the Court enters the following order:

Dated: May 22, 1986.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND
COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOSEPH CAMAIONE, SR.,)

Plaintiff)

Vs.) No. 3473 of 1984

BOROUGH OF LATROBE,)

Defendant)

ORDER OF COURT

AND NOW, to wit, this 22nd day of
May , 1986, IT IS HEREBY ORDERED, ADJUDGED
AND DECREED that the plaintiff's Complaint in
Mandamus is dismissed.

BY THE COURT:

s/ Gilfert M. Mihalich
President Judge

ATTEST:

Prothonotary

JOSEPH CAMAIONE, SR., : IN THE COMMONWEALTH
Appellant : COURT OF
v. : PENNSYLVANIA
BOROUGH OF LATROBE, :
Appellee : NO. 2045 C. D. 1986

BEFORE:

HONORABLE JOHN A. MACPHAIL, Judge

HONORABLE JAMES GARDNER COLINS, Judge

HONORABLE JACOB KALISH, Senior Judge

ARGUED: October 5, 1987

OPINION BY JUDGE MACPHAIL

FILED: January 27, 1988

Joseph Camaione, Sr. (Appellant) has appealed from an order of the Court of Common Pleas of Westmoreland County (trial court) which dismissed his complaint in mandamus. For the reasons which follow, we reverse the trial court's order and remand to that Court to direct the reinstatement of Appellant's benefits until such time as it has been determined in an evidentiary hearing that Appellant's temporary disability has ceased.

Joint stipulations of fact filed in this case¹ reveal that Appellant suffered a work-related injury on February 5, 1975, while employed as a police officer by the Borough of Latrobe (Borough). From the date

¹See Joint Stipulations of Fact, Reproduced Record at 18. Although the trial court also ordered an evidentiary hearing, we are informed by the briefs of counsel that no such hearing has been held.

of his injury to September 1, 1981, Appellant received both workmen's compensation benefits and a salary supplement (Heart and Lung Benefits) pursuant to Section 1 of the Act of June 28, 1935 (Act P.L. 477 as amended, 53 P.S. Section 637.

Effective September 1, 1981, the Borough involuntarily retired Appellant for economic reasons and terminated payment of his Heart and Lung benefits and began monthly payments of Appellant's retirement benefits. Appellant continued to receive his monthly workmen's compensation benefits until January, 1983, when following a referee's hearing, Appellant's condition was determined to have changed from total to partial disability and his benefits were reduced to \$63.00 per week. The referee also found that the partial disability would remain for 500 weeks and commuted his entitlement to a \$25,000.00 lump sum which Appellant received on approximately February 22, 1983.

Appellant's complaint in mandamus

was filed in the trial court on May 22, 1984, and was dismissed by that court on May 22, 1986. The instant appeal followed.

Appellant first argues that the termination of his Heart and Lung benefits was not proper because he was not first given notice and a hearing on the matter.

Our Supreme Court dealt with a similar issue in Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981), which also involved a police officer's claim that his Heart and Lung benefits had been improperly terminated. In Callahan, the state police medical officer and an official in the State Workmen's Insurance Fund unilaterally determined that Mr. Callahan's disability had changed from temporary to permanent and that he was therefore no longer entitled to Heart and Lung benefits and a letter to that effect was sent to Mr. Callahan.

In that case our Supreme Court stated that "[a]judicatory action cannot be

validly taken by any tribunal, . . . except upon a hearing wherein each party has opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence on his own behalf, and to make argument." Id. at 465, 431 A.2d at 948.

This Court, however, also dealt with a situation similar to that presented here in Hasinecz v. Pennsylvania State Police, 100 Pa. Commonwealth Ct. 622, 515 A.2d 351 (1986). In that case, Mr. Hasinecz (Claimant) became disabled in the course of his employment as a police officer and received Heart and Lung benefits until he voluntarily retired. Claimant then requested that his retirement be revoked and his Heart and Lung benefits be reinstated until his doctor released him for full-time duty with the police force. The request was denied following which Claimant requested a hearing to determine his right to receive Heart and

Lung benefits during the period following his retirement. That request was also denied.

On appeal to this Court, we determined that Claimant had no personal or property right entitling him to a hearing under the Administrative Agency Law² because pursuant to police policy, he had no right to reinstatement with the police force nor did he have a right to Heart and Lung benefits after his retirement since he was no longer a "member" of the police force and, accordingly, was not within the class of persons granted benefits under the Heart and Lung Act.

In reconciling these two cases a critical distinction becomes apparent. In Hasinecz, Claimant lost his right to Heart and Lung benefits by voluntarily retiring, while in Callahan, the claimant's right to Heart and Lung benefits was lost through the unilateral determination of the State

²See Sections 101 and 504 of the Administrative Agency Law, 2 Pa. C.S. Sections 101 and 504.

Workmen's Insurance Fund that Mr. Callahan's disability had changed from temporary to permanent. We believe the situation presented in the present case is similar to that presented in Callahan.

In the present case Appellant's right to Heart and Lung benefits was lost through the Borough's act of involuntarily retiring him. Although Appellant was afforded his due process rights with respect to the involuntary retirement action, he was given no notice that that procedure would also dispose of his separate but dependent rights under the Heart and Lung Act.³ In cases such as that presented here, the

³We have stated that adequate notice of administrative action is notice which is reasonably calculated under all the circumstances to apprise the parties of the pendency of the action and give them an opportunity to present their objections. Clark v. Department of Public Welfare, 58 Pa. Cmwlth. Ct. 142, 427 A.2d 712 (1981). Clearly, the notice provided Appellant in the instant case was not adequate since it did not inform Appellant that the Borough intended to not only involuntarily retire him but to also terminate his Heart and Lung benefits on his involuntary retirement.

potential for abuse by the Borough in involuntarily retiring employees in order to terminate their responsibility under the Heart and Lung Act appears clear.

Accordingly, we hold that one's property rights under the Heart and Lung Act cannot be extinguished by an involuntary retirement action unless that action also contains notice to the retiree of the effect involuntary retirement will have on the retiree's right to Heart and Lung benefits.⁴

Since the notice provided Appellant in the present case with respect to his involuntary retirement did not also notify him of the effect involuntary retirement would have on his right to Heart and Lung

⁴We emphasize that the Heart and Lung benefits also cannot be terminated later in a separate adjudication on the basis that the retiree is no longer an "employee" where the initial involuntary retirement action did not notify the retiree that retirement would provide a basis for the termination of Heart and Lung benefits. In situations such as that presented here, it appears that in order to terminate Heart and Lung benefits, the Borough must conduct a hearing and prove that Appellant's partial disability has ceased or become permanent.

benefits, those benefits cannot be terminated on the basis of his involuntary retirement.

Further, we agree with Appellant that the proper relief in mandamus in this case is the reinstatement of his Heart and Lung benefits until such time that those benefits are terminated through a proper administrative adjudication.⁵ See McKelvey v. Colonial School District, 35 Pa. Commonwealth Ct. 264, 385 A.2d 1040 (1978).

In light of our foregoing determination, we find it unnecessary to address Appellant's other arguments.⁶

⁵The Borough also argues that the instant action is barred because Appellant failed to bring the action within thirty (30) days (as required by Section 5571(b) of the Judicial Code, 42 Pa. C.S. Section 5571(b)) of the Borough's involuntary retirement action and subsequent termination of his Heart and Lung benefits. Since we have determined that Appellant's Heart and Lung benefits cannot be terminated based on his involuntary retirement in this case and since there has been no adjudication or final order with respect to Appellant's Heart and Lung benefits, the 30-day limitation period for filing of appeals does not apply.

⁶Appellant also argued that the workmen's compensation referee's determination that Appellant's total

s/ John A. MacPhail

Judge

disability had resolved to partial and would last for an additional 500 weeks did not provide a proper basis for the automatic termination of his Heart and Lung benefits and that his case was not untimely filed because there is no statute of limitations in the Act and a period of reasonableness under the circumstances applies.

JOSEPH CAMAIONE, SR., : IN THE COMMONWEALTH
Appellant : COURT OF
V. : PENNSYLVANIA
BOROUGH OF LATROBE, :
Appellee : NO.2045 C.D. 1986

ORDER

The order of the Court of Common Pleas of Westmoreland County is reversed and this case is remanded to that court to direct the reinstatement of Appellant's Heart and Lung benefits until such time as the Borough, after an evidentiary hearing, has proven that Appellant's temporary disability has ceased.

Jurisdiction relinquished.

Date: January 27, 1988 s/John A. MacPhail

Judge

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

JOSEPH CAMAIONE, SR., : No. 96 W.D. Appeal
Appellee : Docket 1988
V. : Appeal from the Order
BOROUGH OF LATROBE, : Dated January 27,
Appellant : 1988, of the Common-
: wealth Court at
: No. 2045 C.D. 1986,
: Reversing the Order
: of May 22, 1986 of
: the Court of Common
: Pleas of Westmoreland
: County, Civil
: Division, at No.
: 3473 of 1984.
: 113 Pa. Cmwlth. Ct.
: 113, 536 A.2d 500
: (1988)
: Argued: September 28,
: 1989

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgement of the Commonwealth Court of Pennsylvania be, and the same is, hereby REVERSED AND ORDER OF COURT OF COMMON PLEAS IS REINSTATED.

s/Irma T. Gardner

Deputy Prothonotary

DATED: December 21, 1989

J-144-1989

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

JOSEPH CAMAIONE, SR., : No. 96 Western
Appellee : District Appeal
V. : Docket 1988
BOROUGH OF LATROBE, : Appeal from the
Appellant : Order Dated January
: 27, 1988, of the
: Commonwealth Court
: at No. 2045 C. D.
: 1986, Reversing the
: Order of May 22,
: 1986 of the Court
: of Common Pleas of
: Westmoreland County
: Civil Division, at
: No. 3473 of 1984.
: 113 Pa. Commwlth.
: Ct. 113, 536 A.2d
: 500 (1988)
: Argued: September
: 28, 1989

OPINION OF THE COURT

MR. JUSTICE PAPADAKOS FILED: DECEMBER 21,
1989

This is the appeal of the Borough of Latrobe (Borough) from the opinion and order of the Commonwealth Court reversing an order of the Court of Common Pleas of Westmoreland County and remanding to that court with instructions that benefits under the Heart and Lung Act¹ be restored to Joseph Camaione, Sr., (Appellee) until such time as an evidentiary hearing is conducted to establish whether Appellee's temporary disability has ceased.

The facts underlying this matter were stipulated to by the parties and are relatively simple. Appellee, a police officer of the Borough, suffered a work-related injury on February 5, 1975. Appellee could not return to work and began receiving

¹Act of June 28, 1935, P.L. 477, Section 1, 53 P.S. Section 637, as amended May 31, 1974, P.L. 309 No. 99 Section 1, 53 P.S. Section 637 (Supp. 1981.82).

Heart and Lung benefits because he was deemed temporarily incapacitated from performing his duties.² Appellee was also awarded worker's compensation benefits which were paid over to the Borough as a form of subrogation in accordance with the provisions of the Heart and Lung Act.

This arrangement continued until July 27, 1981, when the Borough enacted a Resolution, effective as of September 1, 1981, requiring the retirement of the two oldest police officers on the Borough Police Force, one of whom was Appellee. This action

²The section pertinent to this case is found at 53 P.S. Section 637 and provides as follows:

Any policeman . . . of any
Borough . . . who is
injured in the performance
of his duties . . . and by
reason thereof is
temporarily incapacitated
from performing his duties,
shall be paid by the . . .
municipality, by which he
is employed, his full rate
of salary, as fixed by
Ordinance or Resolution,
until the disability
arising therefrom has
ceased.

was taken pursuant to 53 P.S. Section 46190 which permits Boroughs to retire employees eligible for pensions starting with the oldest employee and following in order of age if economic reasons exist to reduce the size of the police force.

- Appellee was notified that the Borough was contemplating this action and that the Resolution was, in fact, enacted. Beginning on September 1, 1981, Appellee's regular salary check issued pursuant to the Heart and Lung Act was terminated and he began receiving the worker's compensation check directly as well as a pension check which together totalled more than the salary he had been receiving pursuant to the Heart and Lung Act.

In January, 1983, however, a referee for the Worker's Compensation Board reviewed Appellee's disability claim and, following a hearing, determined that Appellee's condition was no longer total and that an adjustment to his weekly benefits

would have to be made. Because the partial disability would exist for over 500 weeks, the referee determined that a lump sum payment of \$25,000.00 was in order and, accordingly, awarded this amount to Appellee which he accepted on February 22, 1983.

As a result of this action, Appellee's worker's compensation check was terminated and he continued to receive his pension check only. He now was receiving each month less than his salary had been. This situation continued for fifteen months when, on May 22, 1984, Appellee filed a complaint in Mandamus seeking to have the Borough restore his full salary under the provisions of the Heart and Lung Act. Appellee reasoned that he was entitled to his full salary as long as his disability was of a temporary nature and that he was never afforded a hearing to establish that a change in his condition had occurred. The trial court denied relief, but the Commonwealth Court reversed holding that Appellee was

entitled to notice that his involuntary retirement would affect his rights ;under the Heart and Lung Act.

In so holding, the Commonwealth Court relied on our decision in Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981), for the proposition that a police officer's status under the Heart and Lung Act could not be changed from temporary disability to permanent disability without a due process hearing. We accepted the Borough's petition for allowance of appeal to examine whether Callahan was properly applied in the situation where a Borough exercises its legislative prerogative under the Borough Code to control the size of its police force because of economic reasons.

When we have had occasion to review the provisions of the Heart and Lung Act, we have emphasized that this remedial legislation provides compensation for police who suffer temporary incapacity or disability in the performance of their work. The

guarantee of uninterrupted income during periods of temporary disability has been cited as an attraction for service in the police force and one that assures a reasonably speedy return to full active duty. Kurtz v. Erie, 389 Pa. 557, 133 A.2d 172 (1957). Compensation for total disability is not permitted under the statute and has not been allowed by this Court. Kurtz; Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957).

In addition, once it is determined that a policeman qualifies for benefits under the Heart and Lung Act, his disability status cannot be changed from temporary to permanent unless a due process hearing is afforded. Cunningham v. Pennsylvania State Police, 510 Pa. 74, 507 A.2d 40 (1986); Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981).

We have also indicated, however, that the benefits of full compensation granted by the Act can be terminated through

voluntary retirement and the Commonwealth Court and the Superior Court have both applied the statute in this manner. See, Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957); See also, Hasinecz v. Pennsylvania State Police, 100 Pa. Commonwealth Ct. 622, 515 A.2d 351 (1986) (Court indicated that benefits of act do not extend to former members of police force); and White v. West Norriton Township, 158 Pa. Superior Ct. 375, 45 A.2d 401 (1946) (Court held that dismissed police officer could not invoke benefits of the act.)

The other statute that comes into play in this case is the Borough which authorizes a borough to reduce its police force for reasons of economy.³ This section

³53 P.S. Section 46190 provides in pertinent part:

If for reasons of economy or other reasons it shall be deemed necessary by any borough to reduce the number of paid employees of the police or fire force,

vests authority in the Borough, as the body responsible for fiscal matters to control the size of its police and fire departments by implementing cuts when reasons of economy come into play.

We have held that an officer who is retired under this section is not entitled to a hearing before the Civil Service Commission since there are no charges motivating the retirement. Kusza v. Maximonis, 363 Pa. 479, 70 A.2d 329 (1950). We have also affirmed the authority of a municipality to enact mandatory retirement legislation as a necessary detail of municipal administration and no appeal lies from such action. In re: Wallington's Appeal, 390 Pa. 416, 135 A.2d

then such borough shall apply the following procedure: (i) if there are any employees eligible for retirement or pension law . . . then such reduction in numbers shall be made by retirement of such employees, starting with the oldest employee and following in order of age respectively.

744 (1957). These cases stand for the proposition that municipalities must have the power to control the orderly and proper functioning of their retirement funds and to react in a responsible manner to economic developments because they and they alone are required to raise tax revenues to fund the programs which are determined to be necessary.

The question here presented is whether Appellee's involuntary retirement can be accomplished under this section without a hearing, and if so, whether this retirement can have an effect on his benefits under the Heart and Lung Act. As we have already recited, the Heart and Lung Act provides for continuing compensation during temporary disability for current members of the police force and the Borough Code provides for a non-reviewable involuntary retirement for economic reasons.

The Borough argues that since Appellee does not question that an economic

hardship existed when he was retired and that he had the requisite seniority to be retired, he could be retired under Section 46190 without notice and with no right of appeal. The Borough also argues that the Heart and Lung Act benefits do not confer a property right which supercedes the Borough's right to regulate its police complement because of economic hardship. We agree.

did not have a right to continued membership in the police force different than any other police officer employed by the Borough, there was no property right affected by his retirement. Accordingly, there was no adjudication which deprived him of a right for which a hearing was required. In re Wallington, 390 Pa. 416, 135 A.2d 744 (1957); Kusza v. Maximonis, 363 Pa. 479, 70 A.2d 329 (1950).

The Order of the Commonwealth Court is reversed and the Order of the Court of Common Pleas is reinstated.

MR. JUSTICE LARSEN files a Concurring Opinion.

J-144-1989

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOSEPH CAMAIONE, SR., : No. 96 Western
Appellee : District Appeal
V. : Docket 1988
BOROUGH OF LATROBE, : Appeal from the
Appellant : Order Dated January
: 27, 1988, of the
: Commonwealth Court
: at No. 2045 C. D.
: 1986, Reversing the
: Order of May 22,
: 1986 of the Court
: of Common Pleas of
: Westmoreland County
: Civil Division, at
: No. 3473 of 1984.
: 113 Pa. Commwlth.
: Ct. 113, 536 A.2d
: 500 (1988)
: Argued: September
: 28, 1989

CONCURRING OPINION

JUSTICE ROLF LARSEN

FILED: DECEMBER 21,

1989

I join the majority opinion, especially in light of the fact that appellant, the Borough of Latrobe, and appellee, Joseph Camaione, Sr., entered into a stipulation that appellee was retired "[f]or reasons of economy, and the necessity to reduce projected expenditures in order to balance the budget for the fiscal year ending December 31, 1981, ..."

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Prothonotary 801 City-County Building
Pittsburgh, PA 15219
(412) 565-2816

IRMA T. GARDNER
Deputy Prothonotary

February 20, 1990

Vincent J. Quatrini, Jr., Esquire
550 East Pittsburgh Street
Greensburg, PA 15601

In Re: Joseph Camaione, Sr. v. Boro of
Latrobe
No. 96 W. D. Appeal Docket 1988

Dear Mr. Quatrini:

The Court has entered the following
Order on your Application for Reargument in
the above matter:

"PER CURIAM:

AND NOW, to-wit this 20th day
of February, 1990, the Application
for Reargument is denied."

Very truly yours,

s/ Irma T. Gardner

Deputy Prothonotary

ITG:cho

cc: James E. Kelley, Jr., Esquire

Anthony C. Busillo, Esquire

Hon. Gilfert M. Mihalich, P.J.

APPENDIX B - TEXTS OF
CONSTITUTIONS AND STATUTES

- (1) Constitution of the United States of America, Amendment 14, Section 1.
- (2) Constitution of the Commonwealth of Pennsylvania, Article 1, Section 1.
- (3) Pennsylvania Heart and Lung Act, 53 P.S. Section 637.
- (4) Pennsylvania Borough Code, 53 P.S. Section 46190.
- (5) Pennsylvania Administrative Agency Law, 2 Pa. C.S.A. Section 504.

APPENDIX B (1)
CONSTITUTION OF THE UNITED STATES
OF AMERICA,

AMENDMENT 14, SECTION 1.

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B (2)

CONSTITUTION OF THE COMMONWEALTH OF
PENNSYLVANIA,

ARTICLE I, SECTION 1.

Section I. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring possessing and protecting property and reputation, and of pursuing their own happiness.

APPENDIX B (3)

PENNSYLVANIA HEART AND LUNG ACT,

53 P.S. SECTION 637

State police enforcement officers,
investigators, parole agents, correction
officers, psychiatric security aides, drug
enforcement agents, policemen, firemen, part
guards; injuries and diseases; compensation
and expenses

(a) Any member of the State Police Force, any enforcement officer or investigator employed by the Pennsylvania Liquor Control Board, and the parole agents, enforcement officers and investigators of the Pennsylvania Board of Probation and Parole, Capitol Police officers, correction officers employed by the Department of corrections, whose principal duty is the care, custody and control of inmates, psychiatric security aides employed by the Department of Public

Welfare and the Department of Corrections, whose principal duty is the care, custody and control of the criminally insane, and drug enforcement of the drug laws of the Commonwealth, any member of the Delaware River Port Authority Police or any policeman, fireman or park guard of any county, city, borough, town or township, who is injured in the performance of his duties including, in the case of firemen, duty as special fire police, and by reason thereof is temporarily incapacitated from performing his duties, shall be paid by the Commonwealth of Pennsylvania if a member of the State Police Force or an enforcement officer or investigator employed by the Pennsylvania Liquor Control Board or the parole agents, enforcement officers and investigators of the Pennsylvania Board of Probation and Parole, Capitol Police officers, correction officers employed by the Department of Corrections, whose principal duty is the care, custody and control of inmates, psychiatric security

aides employed by the Department of Public Welfare and the Department of Corrections, whose principal duty is the care, custody, and control of the criminally insane, and principal duty is the enforcement of the drug laws of the Commonwealth, or by the Delaware River Port Authority if a member of the Delaware River Port Authority Police or by the county, township or municipality, by which he is employed, his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased. All medical and the hospital bills, incurred in connection with any such injury, shall be paid by the Commonwealth of Pennsylvania or by the Delaware River Port Authority or by such county, township or municipality. During the time salary for temporary incapacity shall be paid by the Commonwealth of Pennsylvania or by the Delaware River Port Authority or by the county, city, borough, town or township, and workmen's compensation, received or collected

by any such employee for such periods, shall be turned over to the Commonwealth of Pennsylvania or to the Delaware River Port Authority or to such county, city, borough, town or township, and paid into the treasury thereof, and if such payment shall not be so made by the employee the amount so due the Commonwealth of Pennsylvania, the Delaware River Port Authority or the county, city, borough, town or township shall be deducted from any salary then or thereafter becoming due and owing.

(b) In case of the State Police Force, enforcement officers and investigators employed by the Pennsylvania Liquor Control Board and the parole agents, enforcement officers and investigators of the Pennsylvania Board of Probation and Parole, Capitol Police officers, correction officers employed by the Department of Corrections, whose principal duty is the care, custody and control of inmates, psychiatric security aides employed by the Department of Public

Welfare and the Department of Corrections whose principal duty is the care, custody, and control of the criminally insane, and drug enforcement agents of the Office of Attorney General whose principal duty is the enforcement of the drug laws of the Commonwealth, members of the Delaware River Port Authority Police and salaried policemen and firemen who have served for four consecutive years or longer, diseases of the heart and tuberculosis of the respiratory system, contracted or incurred by any of them after four years of continuous service as such, and caused by extreme overexertion in times of stress or danger or by exposure to heat, smoke, fumes or gases, arising directly out of the employment of any such member of the State Police Force, enforcement officers, investigator employed by the Pennsylvania Liquor Control Board, guard or enforcement officer employed by the Department of Corrections or parole agent, enforcement officer or investigator of the Pennsylvania

Board Of Probation and Parole, Capitol Police officers, correction officers employed by the Department of Correction whose principal duty is the care, custody and control of inmates, psychiatric security aides employed by the Department of Public Welfare and the Department of Corrections whose principal duty is the care, custody and control of the criminally insane, and drug enforcement agents the Office of the Attorney General whose principal duty is the enforcement of the drug laws of the Commonwealth, member of the Delaware River Port Authority Police, or policeman or fireman, shall be compensable in accordance with the terms hereof; and unless any such disability shall be compensable under the compensation laws as having been caused by accidental injury, such disability shall be compensable under the compensation laws as having been caused by accidental injury, such disability shall be compensable as occupational disease disabilities are presently compensable under the compensation

laws of this Commonwealth. It shall be presumed that tuberculosis of the respiratory system contracted or incurred after four consecutive years of service was contracted or incurred as a direct result of employment.

(c) In the case of any person receiving benefits pursuant to this act, the statutes of limitations set forth in section 306.1, 315, 413, and 434 of the act of June 2, 1915 (P.L. 736, No. 338, known as The Pennsylvania Workmen's Compensation Act) shall not begin to run until the expiration of the receipt of benefits pursuant to this act.

(d) All payments herein required to be made by the Commonwealth of Pennsylvania on account of any member of the State Police Force shall be made from moneys appropriated to the Pennsylvania State Police, and any payments required to be made on account of any enforcement officer or investigator employed by the Pennsylvania Liquor Control Board shall be from

appropriations out of the State Stores Fund, any payments^{*} required to be made on account of any parole agent, enforcement officer or investigator employed by the Pennsylvania Board of Probation and Parole shall be from moneys appropriated to the Pennsylvania Board of Probation and Parole, any payments required to be made on account of Capitol Police officers shall be made from moneys appropriated to the Department of General Services, any payments required to be made on account of any correction officer shall be made from moneys appropriated to the Department of Corrections, any payments required to be made on account of any psychiatric security aides shall be made from moneys appropriated to the Department of Public Welfare or the Department of Corrections where appropriate, and any payments required to be made on account of any drug enforcement agent shall be made from moneys appropriated to the Office of Attorney General.

As amended 1974, May 31, P.L. 309, No. 99
Section 1, effective in 90 days; July 1, P.L.
687, No. 117, Section 2, imd. effective;
1986, Dec. 19, P.L. 1733, No. 208, Section 1,
effective in 30 days.

Appendix B (4)

PENNSYLVANIA BOROUGH CODE

53 P.S. SECTION 46190

Section 46190. Removals

No person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for the following reasons:

(1) Physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service.

(2) Neglect or violation of any official duty.

(3) Violation of any law which provided that such violation constitutes a misdemeanor or felony.

(4) Inefficiency, neglect, intemperance, immorality, disobedience of orders, or conduct unbecoming an officer.

(5) Intoxication while on duty.

(6) Engaging or participating in

conducting of any political or election campaign otherwise than to exercise his own right of suffrage.

A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

If for reasons of economy or other reasons it shall be deemed necessary by any borough to reduce the number of paid employees of the police or fire force, then such borough shall apply the following procedure: (i) if there are any employees, eligible for retirement under the terms of any retirement or pension law, if the party to be retired exceeds the maximum age as defined in the Act of October 27, 1955 (P.L. 744, No. 222), known as the "Pennsylvania Human Relations Act",¹ then such reduction in numbers shall be made by retirement of

¹43 P.S. Section 951, et seq.

such employees, starting with the oldest employee and following in order of age respectively, (ii) if the number of paid employees in the police force or fire force eligible to retirement is sufficient to effect the necessary reduction in numbers, or if there are no persons eligible for retirement, or if no retirement or pension fund exists, then the reduction shall be effected by furloughing the person or persons, including probationers, last appointed to the respective force. Such removal shall be accomplished by furloughing in numerical order commencing with the person last appointed until such reduction shall have been accomplished. In the event the said police force or fire force shall again be increased the employees furloughed shall be reinstated in the order of their seniority in the service. The provisions of this paragraph as to reduction in force are not applicable to a chief of police.

As amended 1967, Oct. 9, P.L. 339,
Section 1, effective in 60 days: 1981, Oct
22, P.L. 311, No. 107, Section 1, effective
in 60 days; 1984, May 31, P.L. 362, No. 72,
Section 2, effective in 60 days.

APPENDIX B (5)

ADMINISTRATIVE AGENCY LAW,

2 Pa. C.S.A. SECTION 7509

Section 504. Hearing and Record

No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings.

1978, April 28, P.L. 202, No. 53, Section 5,
effective June 27, 1978.

APPENDIX C - REFERENCES TO FEDERAL QUESTION

- (1) Petitioner's Memorandum filed in the
Court of Common Pleas of Westmoreland
County, Pennsylvania, pages 14-15.
- (2) Petitioner's Brief to the Commonwealth
Court of Pennsylvania, pages 6-16.
- (3) Petitioner's Brief to the Supreme Court
of Pennsylvania, pages 10-18.

APPENDIX C (1)

In other words, the Borough presently saves \$957.12 per month in salary by retiring Mr. Camaione (not to mention the incalculable fringe benefit cost) and Mr. Camaione receives his full salary amount even though \$684.12 of it is being paid by a retirement plan and not the Borough.

It is important to note that if the Borough had selected an employee for retirement that was not on a work-related disability (which the case of EEOC v. Coraopolis permits them to do) they would have been able to achieve the full savings from eliminating an employee.

Just because the Borough selected Mr. Camaione should not deprive him of rights he is entitled to under a separate piece of protective legislation.

An issue unrelated to the payment of benefits to the Plaintiff under Section 637 has been created by the Borough's action to hire two additional employees, without

proffering either of the positions to Mr. Camaione - all of which directly contravenes the language of Section 46190.

In May of 1984 when the instant action was filed, the borough had not hired the other employees. Therefore, there was no issue as to whether the Borough should have offered those positions to Mr. Camaione. Of course, now there is.

Since the issue was not before the court at the time the case was filed, this Honorable Court may decline to rule upon the propriety of the Borough's hiring under Section 46190 and leave that matter to another proceeding. However, since the issue has ripened during the pendency of the instant proceeding, it is submitted that it would be appropriate, if the Court wishes to do so, to decide if the borough should offer one of the two newly created positions to Mr. Camaione since it retired him, prematurely, under Section 46190 of the General Municipal Law.

Whether or not this Honorable Court decided the latter issue, it submitted that sufficient evidence has been proffered by the Plaintiff to demonstrate, in equity, that he is entitled to receive monthly payments - whatever the source - equal to what his current salary would be if he were still employed as a dispatcher for the Borough of Latrobe.

Section 637 of the General Municipal Law mandates that said payments be made until the temporary disability has ceased. There has been no medical evidence proffered by the Borough that said disability has ended. Therefore, the Borough's obligation continues until such evidence exists and is obtained.

The Borough of Latrobe took a 30 year policeman, and against his will retired him. However, it went further. It cut off rights to which he was entitled to by law. We humbly request the Court to reinstate those rights and order the Borough to pay to

Mr. Camaione his due from September 1, 1981
to the present, and into the future.

Respectfully submitted,

s/Vincent J. Quatrini, Jr.

Attorney for the Plaintiff

APPENDIX C (2)

ARGUMENT

FIRST: WHERE A POLICEMAN IS PARTIALLY DISABLED FROM A WORK RELATED INJURY DOES THE HEART AND LUNG ACT REQUIRE THAT THE BOROUGH SUPPLEMENT THE INJURED EMPLOYEE'S WAGES UNTIL IT IS ESTABLISHED THAT THE POLICEMAN HAS EITHER RECOVERED FROM THE INJURY OR IS PERMANENTLY DISABLED FROM THE INJURY?

SUGGESTED ANSWER: YES

Plaintiff was injured in the course of his duties as a policeman. He was placed on Workers' Compensation benefits. Simultaneously, he began to receive, from the Borough of Latrobe, the difference in pay between what he received from Workers' Compensation and his salary as a policeman. The salary differential is mandated under the

Heart and Lung Act.

In 1981, the Borough terminated the Plaintiff's Heart and Lung benefits even though the claimant remained on workers' compensation and even though they had not obtained any medical evidence to establish that either he had recovered from his injury or would be permanently totally disabled from the injury.

Two years later, in 1983, the Borough, through its Workers' Compensation carrier, filed a petition to terminate or modify the Plaintiff's Workers' Compensation benefits asserting a change in the Plaintiff's medical condition.

As a result of said petition, it was determined that the Plaintiff's disability had resolved to partial in nature. The action of the Borough in 1983 confirmed that the Plaintiff was not permanently disabled. Nevertheless, the Borough made no effort to reinstitute the Plaintiff's Heart and Lung benefits.

Plaintiff, through his counsel, attempted to obtain reinstatement of the salary differential by corresponding with the Borough solicitor. After numerous unsuccessful attempts to obtain a response from the Borough, the instant action was filed.

The Borough responded by asserting that it had the right to stop the Heart and Lung benefits when it involuntarily retired the Plaintiff in 1981.

And, nearly a year after it filed its answer to the complaint, the Borough moved to amend the answer to also claim that even if the Plaintiff is entitled to the benefits, his complaint was not timely filed. The Borough intended that the Plaintiff had only thirty days after it substituted his Heart and Lung checks with retirement checks to appeal the action.

The Court below agreed with the Borough all points raised by the municipality.

The Plaintiff avers that the Court below erred by reaching the following ~~conclusions~~; first, the Court held that even though the Workers' Compensation referee found the claimant was only temporarily partially disabled it was equivalent to permanent disability since partial disability could last up to 500 weeks and at the end of the 500 weeks, the Plaintiff would be over the age of 65.

Secondly, the Court held that the Plaintiff's claim under the Heart and Lung Act was not timely since it was not filed within 30 days of the date the Plaintiff was involuntarily retired by the Borough.

The 'Borough was successful in the Court below in transforming this from a claim to be governed and decided under the Heart and Lung Act into one decided under the provisions of the Borough Code.

It is respectfully suggested that this case has nothing to do with the Borough Code. It has nothing to do with the

decision of the Borough to retire the Plaintiff for economic reasons.

The two actions of the Borough namely, terminating the Plaintiffs Heart and Lung benefits and involuntarily retiring him are mutually exclusive.

The Plaintiff doesn't care whether it was proper to retire him or not or whether the Borough did it within the guidelines of the Borough Code. The only thing the Plaintiff has ever complained about is the cutting off of the supplement to his Workers' Compensation benefit mandated by the Heart and Lung Act.

The language of the Heart and Lung Act is clear:

...any policeman who is injured in the performance of his duties...and by reason thereof is temporarily incapacitated from performing his duties, shall be paid...his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased... 53 P.S., Section 637(a)

Applying the aforementioned law to

the instant facts:

1. The Plaintiff was injured in the course of his employment as a policeman in 1975.
2. The Plaintiff was placed on temporary total disability by the Borough.
3. The Plaintiff was paid a salary differential by the Borough until 1981.
4. The Plaintiff's disability had not ceased when the Borough cut off said salary supplement.

Consequently, the Plaintiff submits that he is entitled to reinstatement of said benefits from 1981 to the present and into the future until it is determined that said disability has ceased.

Case law, although very meager, has suggested an alternative way to cut off benefits under the above provision; namely, where a municipality has demonstrated that

the individual is permanently disabled from returning to the police force.

At one point, the Court below acknowledged that once a person is deemed "temporarily incapacitated," the burden is on the Defendant Borough to establish by substantial evidence ~~that~~ the condition caused by the job-related injury would permanently prevent the employee from resuming active duty on the force. The Court cited Palmeri v. Com., Pennsylvania State Police, 82 Pa. Cmwlth. 348, 474 A.2d 1223 (1984), and Cunningham v. Com., Pennsylvania State Police, 82 Pa. Cmwlth. 459, 475 A.2d 933 (1984) for the principle and scheduled a hearing to take testimony on the issue noting that the Stipulations of Fact were inadequate for resolution of the issue. For some reason the Court never took the testimony. Instead it issued its decision without any medical evidence from the Borough. (R. 32-43)

Applying the Palmeri principle to the

instant case, the Borough had no medical evidence to indicate that the Plaintiff was permanently disabled when they stopped his benefits in 1981. In fact, the Borough was not even concerned with the Plaintiff's medical condition in 1981. Their only focus was to remove him from the Police force for the purpose of saving money in the police budget.

The Borough defends its action by arguing that, although it did not do anything to find out if the Plaintiff was permanently disabled in 1981, the application of hindsight will show that if they had thought about it they could have shown he was permanently disabled.

For instance, the Borough says he got hurt in 1975 and he still wasn't back to work in 1981. Inferentially, it is suggested that six years of disability equates to permanence. It is submitted that inference is no substitute for medical evidence. Besides, where is the evidence to

indicate the Borough ever offered to have the Plaintiff come back and try his old job? And, by the way, is it not significant that the Plaintiff was a dispatcher for the Boro? Plaintiff's duties would not require him to do street duty. He would sit behind a desk all day and answer calls.

The Borough says that in 1983 the Workers' Compensation referee placed the Plaintiff on partial disability and partial disability can last up to 500 weeks and 500 weeks means that the Plaintiff would have been over the age of 65 and over the age of 65 is beyond normal retirement age and that means that the Plaintiff is permanently disabled.

Dissecting this argument reveals several serious flaws in the application to this case. First of all, why is what the Workers' Compensation referee did in 1983 germane to the Boro's conduct in 1981? The Borough cut the Plaintiff off in 1981, not 1983. The primary issue is whether the

Plaintiff was permanently disabled in 1981.

Second of all, the Borough, and the Court below, have taken a finding of fact that is supportive of the Plaintiff's position, namely, that the Borough did not demonstrate that his disability had ceased, and turned it against him.

When the Borough filed a petition against the Plaintiff attempting to terminate his workers' compensation benefits in 1983 the Referee had three choices. He could have found that the Plaintiff had fully recovered from his work related injury, he could have found that the Plaintiff's disability had resolved to partial in nature, or he could have found that the Plaintiff remained totally disabled.

Of the three decisions that the Referee could have made only one would clearly support the claim of the Plaintiff that he continued to be eligible for Heart and Lung benefits -- that his disability was now only partial in nature. For if the

Referee had decided that the Plaintiff was still totally disabled in 1983, the borough could argue that that was evidence of its permanency. And if the Referee had decided that the Plaintiff had fully recovered, the Borough could justly argue that as of at least 1983, it had demonstrated that the Plaintiff's disability had ceased.

It is respectfully suggested that the Court below has drawn an inopposite conclusion from the finding of the Workers' Compensation Referee. Moreover, the Borough well knows that under the Workers' Compensation statute it had the right at any time during the 500 week statutory period to re-petition the Referee if it obtained evidence that the Plaintiff had fully recovered. Also, by definition, partial disability under the Workers' Compensation statute is not permanent. By the mere fact that it runs out after a maximum period of 500 weeks, it is temporary and not permanent.

Finally, where is it written that

because an individual's disability extends beyond his sixty-fifth birthday he would not be going back to work. It is submitted that such a conclusion would be repulsive to the President of the United States, to most of the members of the Supreme Court of the United States, and to chief executive officers of many of the major corporations in America. Not to mention, that the concept may also violate federal law.

In sum, the Plaintiff was injured in 1975. In 1981, at the age of 55, without any attempt to reinstate him, without any interest in determining his ability to return to the job as dispatcher, without a single request for an independent medical evaluation of the permanency of his work related condition, without a single piece of correspondence notifying him of their intentions, without any effort to comply with the unequivocal mandate of the Heart and Lung Act, the Borough of Latrobe cut off important economic rights of the Plaintiff.

SECOND: DOES THE EXERCISE, BY A MUNICIPALITY, OF ITS OPTION TO INVOLUNTARILY RETIRE A POLICEMAN FOR ECONOMIC REASONS RELIEVE IT OF ITS OBLIGATION TO PAY BENEFITS UNDER THE HEART AND LUNG ACT.

STATED ALTERNATIVELY: DOES THE ACTION OF THE BOROUGH OF LATROBE UNDER THE BOROUGH CODE TO RETIRE THE PLAINTIFF HAVE ANYTHING TO DO WITH PLAINTIFF'S RIGHTS UNDER THE HEART AND LUNG ACT?

SUGGESTED ANSWER: NO

The Borough of Latrobe has paraded its economic plight before the Court below in an attempt to justify its impermissible termination of the Plaintiff's statutory benefits.

In a nutshell, the Borough argues that it exercised its rights to retire the Plaintiff under Section 46190 of the Borough Code and when it did so it also had the right to stop paying him a salary differential

mandated under another Pennsylvania statute without regard for the provisions of that statute.

The Borough's position is belied by the plain fact that there is nothing in the Heart and Lung Act that authorizes the Borough to tamper with an individual's rights thereunder except for one reason -- if the individual recovers from the work related injury.

The legislative history contains some guidance as to the harm sought to be remedied by this legislation:

"Mr. EROE: . . . We expect our police and firemen to perform their duties under sometimes very hazardous conditions. I think that it is no more than right that the people in these subdivisions take care of these men if they are injured in the line of duty, and provide them with compensation until they are fit to return to duty. I ask for the support of this bill." 1979 Op.Atty.Gen.No.4

The Borough has the right to retire the Plaintiff. The Plaintiff has never complained about that decision. They retired

him. Why is one decision tied to the other?

The Borough argues that unless they are permitted to cut off the Plaintiff's Heart and Lung benefits, they will not achieve an economic savings. Again, the Borough's position is belied by the facts. When the Borough retired the Plaintiff they began an immediate savings of a portion of Plaintiff's salary. They also began to save all of the monies they previously spent on fringe benefits.

Nevertheless, the Borough wanted more. They wanted to save all of the monies that they formerly paid to the Plaintiff as an employee. And for that additional savings, they want to violate the purpose of the Heart and Lung Act.

And the Boro wants to achieve its goal in a case where they created the collision course between the two statutes. First of all, the Borough had six years to have the Plaintiff examined to determine whether he recovered from his work related

injuries. They never did. Secondly, the Borough could have offered the Plaintiff a position with the police department at any time during those six years. They never did. Thirdly, the Borough could have picked another employee, who was not on a work related leave, to retire. They didn't.

The Borough argues that the language of Section 46190 is mandatory in that it required the Borough to retire the most senior employees first. This position is contravened by the case law. In the case of EEOC v. Borough of Coraopolis, Civil Action No. 84-736 (W.D. Pa., 1984) decided by Judge Simmons, a Borough policeman similarly situated as the claimant in the instant case was involuntarily retired. The Coraopolis policeman was also on workers' compensation. The Coraopolis policeman was also the most senior member of the force. Judge Simmons determined that the action of the Borough in retiring the Plaintiff because of his status as the oldest employee violated the Equal

Employment Opportunity Act. The judge ordered the Borough of Coraopolis to pay to the employee his back wages because its conduct constituted age discrimination.

The Borough created the conflict and now suggests that under the Statutory Construction Act the Boro Code should prevail because it is the statute latest in date of final enactment.

The Boro's arguments that there is any conflict between the two laws is perhaps best laid to rest by its own disregard of the Boro Code. Repeatedly, the Boro clamors that the Boro Code must be given priority. Why then did the Boro hire two other individuals when it decided to begin replenishing its force? On June 12, 1984, the Boro hired James Bumar and Santos Columbo. Mr. Bumar started on June 13, 1984 and Mr. Columbo began on July 2, 1984. The Plaintiff, Mr. Camaione, was not asked if he was interested or able to return to work, even though he was only 57 years of age in June of 1984.

The language of Section 46190 is unequivocal:

In the event the said police force...shall again be increased, the employees furloughed shall be reinstated in the order of their seniority in the service.

Clearly, the Borough failed to comply with the language of Section 46190. If the Borough Code mandated that the Borough retire Mr. Camaione first because he was the oldest then why isn't the same language a mandate when it comes to calling him back.

There is no conflict between this language and the Heart and Lung Act. Is the Borough permitted to pick and choose which sections of the Borough Code it will follow and which it will ignore? Why is the Borough quick to conclude that there is a conflict between the Borough Code and another statute when it wants to cut off a monetary right of the Plaintiff but it finds excuses why it does not have to comply with clear precise language of the Borough Code (which does not

conflict with any other statute) when that language will reinstate other monetary rights of the Plaintiff?

It is submitted that the credibility of the Boro's original action of terminating the Plaintiff's Heart and Lung benefits is besmirched by its subsequent action to ignore him when he was entitled to have his job back.

Appendix C(3)

II. DOES A POLICEMAN W H O I S
INJURED IN THE COURSE OF HIS EMPLOYMENT
ACQUIRE A SEPARATE PROPERTY RIGHT IN HIS
HEART AND LUNG BENEFITS SO THAT WHEN HE IS
INVOLUNTARILY RETIRED BY THE MUNICIPALITY,
DUE PROCESS REQUIRES NOTICE AND HEARING
BEFORE SAID BENEFITS CAN BE TERMINATED?

(ANSWERED BY THE COMMONWEALTH COURT IN THE
AFFIRMATIVE.)

STATED ALTERNATIVELY

II. WHERE A POLICEMAN IS PARTIALLY
DISABLED FROM A WORK-RELATED INJURY, AND THE
MUNICIPALITY PASSES AN ORDINANCE REDUCING THE
SIZE OF ITS POLICE FORCE FOR ECONOMIC
REASONS, THEREBY INVOLUNTARILY RETIRING THE
POLICEMAN, IS THE MUNICIPALITY REQUIRED TO
CONTINUE THE INJURED POLICEMAN'S WAGE
SUPPLEMENT UNDER THE HEART AND LUNG ACT UNTIL
THE MUNICIPALITY ESTABLISHES THAT THE

POLICEMAN HAS EITHER RECOVERED FROM THE
INJURY OR HAS BECOME PERMANENTLY DISABLED
FROM THE INJURY?

(ANSWERED BY THE COMMONWEALTH COURT IN THE
AFFIRMATIVE).

The case at bar is about the
permissible methods for terminating benefits
under the Heart and Lung Act.

There are only two:

1. Establish that the work-
related disability has ceased.

2. Establish that the work-
related disability is permanent, not
temporary.

The Borough has never proved, nor
attempted to prove that Mr. Camaione
recovered from his injury or that Mr.
Camaione became permanently disabled from his
injury.

Consequently, on January 27, 1988, the Commonwealth Court below ordered the Borough to reinstate Heart and Lung benefits to Mr. Camaione until such time as the Borough, after an evidentiary hearing, proves that Mr. Camaione's temporary disability has ceased.

The Borough has not complied with the Commonwealth Court's Order. Nor has the Borough reinstated benefits to Mr. Camaione which it terminated in September 1981.

Instead of complying with the clear mandate of the Commonwealth Court, the Borough has extrapolated a hidden meaning from the decision; namely, that the Commonwealth Court is requiring that the Borough give notice and hold a hearing before involuntarily retiring a policeman pursuant to Section 46190 of the Borough Code (which permits a Borough to reduce its police force for economic reasons).

It is submitted that the Borough's interpretation of the Commonwealth Court

mandate is wrong.

The Commonwealth Court decision is not about Section 46190 of the Borough Code.

The sole focus of the Commonwealth Court was upon what effect, if any, involuntary termination of an injured policeman has on the separate obligation to pay Heart and Lung benefits. It is simply fortuitous that the termination occurred under Section 46190.

The Commonwealth Court never even discusses the propriety of the termination process or the termination itself. It is clear from the decision that Mr. Camaione remains involuntarily retired. The decision of the Commonwealth Court does not change that fact. Nor does the decision of the Commonwealth Court grant Mr. Camaione or any other policeman a pre termination hearing under Section 46190.¹

¹Municipal officials are presumed to have properly performed their duties and to have taken all steps necessary to give validity to their official acts. Miners Savings Bank of Pittston v. Duryea Borough,

To reiterate, this case does not deal with the Borough Code.

Therefore, the entire discussion about the proper procedure for termination of employment under Section 46190 of the Borough Code is surplusage.

And it diverts the attention of the Court away from the thrust of the Commonwealth court holding; namely, that if a temporarily disabled policeman is involuntary retired, for whatever reason, he is entitled to be told that the Borough also intends to stop paying him Heart and Lung benefits.

And, if the Borough does not tell him, and they cut off his Heart & Lung benefits, he will be entitled to reinstatement until the Borough establishes

331 Pa. 458, 463, 200 A. 846, 848 (1938). The one alleging bad faith on the part of the borough officials bears the burden of producing evidence of that bad faith sufficient to rebut the presumption that the officials acted with regularity. Krafttician v. Borough of Carnegie, 35 Pa.Cmwlth. 470, 473, 386 A.2d 1064, 1066 (1978) See also Gruver v. Howell, 368 A.2d at 922.

his recovery or permanent disability from the injury.

And if the Borough does tell him, and he does not do anything about it, within a reasonable period of time under the circumstances, he will be estopped from complaining that he was denied due process.

The language of the Heart and Lung Act is clear:

. . . any policeman who is injured in the performance of his duties . . . and by reason thereof is temporarily incapacitated from performing his duties, shall be paid . . . his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased . . .
53 P.S., Section 637(a)

Case law has suggested an alternative way to terminate benefits under the Heart and Lung Act; namely, where a municipality has demonstrated by competent medical evidence that the policeman is permanently disabled from returning to the

police force.

This Honorable Court dealt with the procedure required for determining "permanent" disability in Callahan vs. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 decided in 1981.

Callahan was a member of the Pennsylvania State Police and was classified "temporarily disabled" under the Heart and Lung Act which entitled him to his full salary as long as he remained in that status. The State Police Medical Officer and an official in the State Workmen's Insurance Fund unilaterally determined that Callahan's disability was no longer temporary but permanent and that he was not entitled to the Heart and Lung benefits.

On January 5, 1978, Callahan received a letter from the Bureau of Personnel of the Pennsylvania State Police informing him that as of February 22, 1978 all benefits which he had been receiving under provisions of the "Heart and Lung Act"

would be terminated.

Callahan immediately requested a hearing on the issue of permanency. His request was denied. Nevertheless, the State Police terminated Callahan's benefits on February 22, 1978.

This Honorable Court ordered the reinstatement of benefits to Callahan and held that before benefits could be terminated (upon a finding of permanent disability) the State Police were required to conduct an administrative hearing on the question in accordance with the terms of the Administrative Agency Law.

This Honorable Court also pointed to Section 1710.31 of the Administrative Agency Law as the standard for an adjudication by any tribunal, whether judicial or administrative:

No adjudication shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be

stenographically recorded
and a full and complete
record should be kept of
the proceedings.

Act of June 4, 1945, P.L.
1388, Section 31, 71 P.S.
Section 1710.31.

So, when the State Police tried to
terminated Fiore R. Palmeri's Heart and Lung
Benefits in 1982, he was given a hearing
prior to a determination of permanent
disability. Palmeri v Pennsylvania State
Police, 82 Pa. Cmwlth 348, 474 A.2d 1223
(1984) Consequently, the primary issue
addressed by the Commonwealth Court after
Palmeri was adjudged permanently disabled by
the hearing officer was the sufficiency of
the medical evidence relied upon by the
agency.

Nevertheless, the Commonwealth
Court reiterated the fundamental principle
that no adjudicatory action, whether
judicial or administrative shall be valid in
the absence of "a hearing wherein each party
has the opportunity to know the claims of his
opponent, to hear the evidence produced

against him, to cross-examine witnesses, to introduce evidence on his own behalf, and to make argument." Callahan v. Pennsylvania State Police, 494 Pa. 461, 465, 431 A.2d 946, 948(1981). Citing Pa. State Athletic Commission v. Bratton, 177 Pa. Super. 598, 112 A.2d 422 (1955); Byers v. Pennsylvania Public Utility Commission, 176 Pa. Super. 620, 109 A.2d 232(1955).

The Borough concedes that if Heart and Lung benefits are to be terminated based upon the cessation of disability or the permanency of disability, due process does require notice and hearing on the factual issues. (Appellant's brief at pg. 14).

Nevertheless, the Borough requests that the notice and hearing requirement be waived² if the termination of benefits

² The Borough argues that the notice it gave to Mr. Camaione telling him that he was involuntarily retired constitutes constructive notice that his Heart and Lung benefits would be terminated and that this should be sufficient notice to him. First of all, Callahan and Palmeri were given actual, not constructive, notice that their benefits were being terminated. Secondly, Callahan

occurs because the Borough is exercising its rights under the staff reduction section of the Borough Code.

The Borough attempts to analogize the situation to a voluntary retirement by a policeman, wherein the Commonwealth Court has held that Heart and Lung benefits may be terminated, without a hearing.

In Hasinecz v. Pennsylvania State Police, 100 Pa.Cmnwlth 622, 515 A.2d 351 (1986), a Pennsylvania State Policeman, who was off work, notified the State Police he wished to exhaust his sick and annual leave and then take a disability retirement. On December 31, 1981 he retired. After he

requires notice and a hearing. The Borough gave Mr. Camaione no hearing. Thirdly, under Section 46190 a police officer has the expectation that his furlough may be temporary, not permanent:

In the event the said police force...shall again be increased, the employees furloughed shall be reinstated in the order of their seniority in the service.

retired, Hacinecz instituted a worker's compensation action claiming that his disability was work-related. He eventually prevailed. Because of the worker's compensation finding that Hacinecz's disability was work-related, the State Police retroactively credited him with Heart and Lung Act benefits, but only for the period between the onset of his disability and his retirement.

After these proceedings, Hacinecz requested the State Police to revoke his retirement and reinstate him to the Police force and to reinstate his Heart and Lung benefits. The State Police refused.

Hacinecz argued that the termination of his Heart and Lung benefits, without a hearing, as of the date he voluntarily retired, constituted a violation of his right to due process.

The Commonwealth Court rejected Hacinecz's argument, reasoning that he was no longer a member of the group protected by the

Heart and Lung Act, namely, state policemen. The Court noted that Hacinecz' benefits were terminated because he retired, and not because his disability was permanent. Therefore, since he was no longer an individual to whom the statute granted a right, he could not claim due process protection emanating from that right. Accordingly, he was not entitled to a hearing on the termination of his Heart and Lung benefits.

The difference between Hacinecz and Camaione is strikingly clear.

Mr. Hacinecz voluntarily retired. Mr. Camaione was involuntarily retired.

Mr. Camaione had a property right in his Heart and Lung benefits which was involuntarily taken away from him. Mr. Hacinecz had a property right in his Heart and Lung benefits which he voluntarily relinquished and was requesting be reinstated.

The very essence of due process is

to prevent an unfair taking of a protected right. In Camaione, the Borough initiated the action which removed Mr. Camaione from the protected class and extinguished his right to future Heart & Lung benefits.

Likewise, there is a material difference in the quality of a property right which has been abandoned and to which one seeks reinstatement and a property right which one possesses and another attempts to take away.

The Commonwealth Court below held that one's property rights under the Heart and Lung Act cannot be extinguished by an involuntary retirement action unless that action also contains notice to the retiree of the effect involuntary retirement will have on the retiree's right to Heart and Lung benefits.

And, in addition to the notice, the individual is entitled to a hearing where the agency must prove that the partial disability

has ceased or become permanent.³

The common thread among Callahan, Palmeri, and Camaione is the attempt by an entity of the government to involuntarily extinguish a vested property right. And where a Borough or the Commonwealth desires to do so, this Honorable Court and the Commonwealth Court have merely attached due process requirements to the process.

Consequently, Mr. Camaione humbly requests this Honorable Court to affirm the order of the Commonwealth Court and remand this matter to the Court of Common Pleas to order the Borough to reinstate Mr. Camaione's

³ The Commonwealth Court addressed this requirement at footnote four in the decision. "We emphasize that Heart and Lung benefits also cannot be terminated later in a separate adjudication on the basis that the retiree is no longer an 'employee' where the initial involuntary retirement action did not notify the retiree that retirement would provide a basis for the termination of Heart and Lung benefits. In situations such as that presented here, it appears that in order to terminate Heart and Lung benefits, the Borough must conduct a hearing and prove that Appellant's partial disability has ceased or become permanent.

Heart and Lung benefits until such time as the Borough, after an evidentiary hearing, has proven that Mr. Camaione's temporary disability has ceased.

TABLE OF AUTHORITIES

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<u>Cunningham v. Pennsylvania State</u> <u>Police</u> , 510 Pa. 74, 507 A.2d 40 (1986)	10, 11
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CONSTITUTIONAL PROVISIONS

Constitution of the United States of America,

Amendment 14, Section 1.

Constitution of the Commonwealth of

Pennsylvania, Article 14, Section 1.

STATUTES

1. Pennsylvania Heart and Lung Act, Act of June 28, 1935, P.L. 477, Section 1, 53 P.S., Section 637, Section 1, 53 P.S. Section 637 (Supp. 1981.82).
2. Pennsylvania Borough Code, 1966, Feb. 1. P.L. (1965) No. 581, Section 46190, et seq., as amended.
3. Pennsylvania Administrative Agency Law, 1978, April 28, P.L. 202, No. 53, Section 5, Pa. C.S.A. Section 101 and 504.

